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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 17.

JESSE M. CALHOON, as President, or HERBERT W. PETERS, as Secretary Treasurer of District No. 1, National Marine Engineers Beneficial Association,

Petitioner,

against

RAYMOND H. HARVEY, HERMAN SHAPIRO and JOHN GALLETTA, each of them individually and on behalf of all other persons similarly situated,

Respondents.

PETITION FOR REHEARING.

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Now come Raymond H. Harvey, Herman Shapiro and John Galletta, each of them individually and on behalf of all other persons similarly situated, Respondents, and respectfully pray the Court to grant a rehearing in this cause.

The Court's decision rests upon the view that, because Section 402 of the Labor Reform Act provides an administrative remedy by which (in certain unusual circumstances) the results of an *already completed* election may be set aside, it must follow that union members are foreclosed from bringing suit under Title I to protect their democratic rights in elections *yet to be conducted*. In obedience to that view, the Court gives a stingy construc-

tion to Section 101(a)(1) and emasculates that section's guarantee of equal, democratic rights (slip opinion, page 5).

Specifically, Section 101(a)(1) guarantees to every member of a labor organization the equal rights to nominate candidates, to vote, etc., subject to reasonable rules and regulations in such organization's constitution and bylaws. The Court's construction of that section destroys the substantive rights, leaving only the qualifying adjective, "equal." As if the assertion, by the framers of the Declaration of Independence, that "all men are endowed . . . with certain inalienable rights" were to be construed as asserting nothing more than inalienability.

But the smile cannot replace the Cheshire cat. Congress added Title I, the "Bill of Rights of Members of Labor Organizations," to what is now the Labor Reform Act in order to protect union members' substantive, democratic *rights*, because it believed that Section 402, standing alone, did not provide adequate protection for them. It sought to provide a direct, private, civil remedy independent of Section 402 for the infringement of those rights. It is that remedy which the respondent trade unionists invoke here. Respondents ask the courts to invalidate certain restrictions which are in fact destructive of their Section 101(a)(1) rights to nominate candidates, so that they and their fellow-members will not be barred from participating democratically in future elections of their union.

By declaring that such a suit may not be maintained, this Court rules that the substantive rights of electoral participation guaranteed to every union member by Section 101(a)(1) may not be protected except (under Section 402) retroactively and in the discretion of the Secretary of Labor. A corollary to that ruling is that the substantive

rights of *non*-electoral participation also guaranteed by Section 101(a)(1) (the rights to vote in referendums, to attend meetings, to participate in deliberations) may not be protected at all.

The Court's decision thus undercuts the "pervading premise" of both Title I and Title IV: namely, the premise "that there should be full and active participation by the rank and file in the affairs of the union." *American Federation of Musicians* v. *Wittstein* (No. 27, decided December 7, 1964; slip opinion, page 12), 33 LW 4031, 4035. The Court permits a union officialdom to suppress the membership's rights of democratic participation so long as it suppresses them "equally," thus heightening the officialdom's actual *in*equality *vis a vis* the rank and file. The pretense of equality in such a situation is, of course, spurious. *Cf. McLaughlin* v. *Florida* (No. 11, decided December 7, 1964), 33 LW 4035, and the line of "separate but equal" cases cited therein.

The Court undercuts the "pervading premise" of Titles I and IV and emasculates Section 101(a)(1) in apparent deference to that wooden dogma of "substantive symmetry" which it has, in analogous situations, rejected. *Cf. NLRB* v. *Radio Engineers*, 364 US 573, 584-585. In *International Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 US 237, 244, the Court was confronted with the separate statutory provision (in Titles I and III of the Labor Management Relations Act of 1947) of two separate remedies for the same misconduct, one an administrative remedy, and the other a remedy by private, civil suit. The Court held the two remedies to be separate and independent of each other. The fact that the administrative remedy was conditioned upon a preliminary administrative determination was held in that case to be "only a limitation on administrative power" and not in any way a limitation or con-

dition upon the exercise of the private, civil remedy. And *cf. Smith* v. *Evening News,* 371 US 195.

II.

The Court says (slip opinion, page 6), "Section 402 of Title IV, as has been pointed out, sets up an *exclusive method for protecting Title IV rights,* by permitting an individual member to file a complaint with the Secretary of Labor challenging the validity of any election because of violations of Title IV." (Emphasis added.) But in fact Section 402 merely sets up an exclusive method for challenging the results of *elections already conducted.*

The only reference in Title IV to "exclusivity" resides in the last sentence of Section 403, which makes the Section 402 remedy the exclusive method for challenging elections already conducted. The preceding (second) sentence of Section 403 makes its explicitly clear that *nothing* in Title IV is intended to exclude separate and independent methods for protecting union members' electoral rights in regard to elections yet to be conducted. It would thus appear to be beyond dispute that the existence of the Section 402 remedy does *not* exclude a State court from protecting "Title IV rights" in regard to elections yet to be conducted. *Cf. Beiso* v. *Robilotto* (Sup. Ct., N. Y., 1960), 26 Misc. 2d 137. How "exclusive," then, can the Section 402 procedure be?

Electoral rights can be protected only prospectively. Section 402, having no prospective application, does not pretend to protect union members' "Title IV rights" but merely uses those rights as a gauge for determining the degree of electoral fraud that has been committed in a specific, completed election. Title I, on the other hand, seeks to protect electoral and other rights. It seeks to free

union members from the fetters and restrictions placed upon their rights of democratic participation in their unions' affairs. The relevant congressional policy was enunciated a generation ago by Senator Robert Wagner, Sr.: "Simple justice commands that we unfetter the worker in his effort to achieve his goal." 75 Cong. Rec. 4918 (1932).

III.

The Court says (slip opinion, page 6), "It is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest." But Congress sought to utilize that "special knowledge and discretion" only for the specialized and restricted purpose of determining which election results, from among all those election results tainted to some degree or other by Section 401 violations, should be upset and re-run.

Congress decided *not* to allow the Secretary's "special knowledge" or "discretion" to intrude upon the protection of union members' democratic rights. Congress knew that if union members' democratic rights were to be protected only in the discretion of the Secretary they would evaporate. Compare: *Beck* v. *Ohio*, (No. 12, decided November 23, 1964; slip opinion, page 9), 33 LW 4015, 4017. It believed that allowing union members to bring suit directly to protect their democratic rights was (as Senator Kuchel expressed it) "in the interest of justice." Leg. Hist. 1232. For that reason, the "Kuchel Substitute" (the present Title I) excluded the Secretary's discretion from the protection or determination of union members' rights. As Senator Clark (one of its co-sponsors) pointed out, "it takes the Federal bureaucracy out of this bill of rights and leaves its enforcement to union members, aided by the courts." Leg. Hist. 1233.

Nor is it Congress's policy to leave union members' electoral rights unprotected as a means of allowing wider scope to the Secretary's "special knowledge and discretion" after each election is completed. Such a policy would be roughly equivalent to telling children *not* to eat an apple a day lest it keep the doctor (with his special knowledge and discretion) away. Instead, Congress affirmatively provided protection for union members' electoral and other democratic rights by adding Title I to the Kennedy-Ervin bill. Title I, in short, provides the preventive medicine which (hopefully) will someday keep the Secretary of Labor away from the unions' internal affairs.

IV.

The Court says (slip opinion, page 4), "But Title IV, not Title I, sets standards for eligibility and qualifications of candidates and officials. . . ." But the fact is that both titles set precisely the same standard. Both titles provide that the restrictions, 'aken together, upon the exercise of any guaranteed electoral right must not unreasonably restrict the exercise of that right. Thus the Section 401(e) guarantee of the right of candidacy "subject to . . . reasonable qualifications uniformly imposed" and the Section 101(a)(1) guarantee of the right to nominate candidates "subject to reasonable rules and regulations" are essentially of a piece.

Obviously, the restrictions that impinge upon the free exercise of any specific electoral right are of different kinds. But it is the totality of restrictions upon any specific right that is relevant. If that totality unreasonably restricts the exercise of the right it fails to meet the legislative standard; if it does so reasonably, it meets the test.

Among the totality of restrictions bearing upon the right to nominate candidates, any and all eligibility require-

ments are necessarily included. Section 101(a)(1)'s requirement, that the "rules and regulations" to which the exercise of the right to nominate candidates is subject must be "reasonable," obviously refers to a totality of "rules and regulations" that includes eligibility requirements. Like Shakespeare's rose, the relevance of a restriction does not depend upon its name. It can only follow that eligibility requirements are as much a "Title I matter" as a "Title IV matter," and that neither title has predominance over the other with regard to them.

V.

The Court's decision overlooks the distinction between reasonable restriction upon the exercise of a right and total deprivation of that right. Thus the fact-situation presented in *Mamula* v. *United Steelworkers*, 304 F. 2d 108 (3d Cir.) cert. den. 371 US 823, the case on the basis of which certiorari was petitioned for, and the fact-situation alleged in the instant complaint have become confused.

Mamula involved an eligibility rule barring only one person—Mamula himself—from *being* nominated. All members, including Mamula, were enabled to nominate any member other than Mamula. The result, of course, was that the members' rights to nominate candidates were not at all unreasonably restricted.

But in the instant case, the respondents (and most of their fellow, rank-and-file members) are totally barred from nominating candidates. Here, then, is no reasonable restriction upon their exercise of the nominating right; here is total deprivation of that right. Quite correctly, the Court of Appeals found the combination of restrictions which destroys the members' rights to nominate candidates to be so unreasonable that they would have been invalid even at common law; Rec. 123. But an examination of the

Court's opinion indicates that the Court, in its consideration of the instant case, confused the instant fact-situation with the *Mamula* fact-situation. And thus the clear distinction between reasonable and unreasonable regulation (*cf. United States* v. *Witkovitch*, 353 US 194), which is explicit in Section 101(a)(1), became lost.

A. Thus the Court says (slip opinion, page 4), "The result of [respondents'] allegations here, however, is an attempt to sweep into the ambit of their right to sue in federal court . . . a right to sue if they are not allowed *to nominate anyone they choose* regardless of his eligibility and qualifications under union restrictions." (Emphasis supplied.) But that is only the result of the allegations of the plaintiff in *Mamula*. Respondents in the instant case do not assert any right to nominate anyone they choose; they assert a right to nominate candidates. They do not protest against reasonable eligibility restrictions; they do protest against the total destruction of their rights to nominate candidates.

B. And the Court says (slip opinion, page 4), "And the equal-rights language of §101(a)(1) would have to be stretched far beyond its normal meaning to hold that it guarantees members not just a right to 'nominate candidates,' but a right to nominate *anyone*, without regard to *valid* union rules." (Emphasis supplied.) But that is precisely the point. Respondents ask here that Section 101(a)(1) be construed in what the Court here describes as "its normal meaning." Respondents here assert "just a right to 'nominate candidates.'" It is that right which, under the invalid combination of rules inflicted upon MEBA's members, is denied them. The distinction between the instant case and *Mamula* is the distinction between that

right (the "normal meaning" of Section 101(a)(1)) and the non-existent right "to nominate anyone, without regard to valid union rules."

The Court, in its decision, thus overlooked the fundamental distinction between rules which reasonably restrict the exercise of a right and rules which unreasonably restrict it or totally destroy it. The former was the case in *Mamula;* the latter is the case here. The distinction is so basic to the judicial process as, of itself, to require that the instant decision be fully reconsidered.

VI.

This Petition for Rehearing should be granted, and the case should be set down for reargument on the regular calendar.

Respectfully submitted,

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Certificate of Counsel.

I certify that this petition is presented in good faith and not for delay.

Burton H. Hall

December 1964.